United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7436

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United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

Connecticut State Federation
of Teachers, et al

vs.

Board of Education Members, et al

Docket No. 75-7436

Appellants' Reply Brief

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Clarifying the Issue

While purporting to narrow the issues the Appellees manage at the outset of their Brief to skew matters slightly. They claim that the purpose for which the Appellants seek to use school facilities is to communicate "views on matters which have been entrusted, by the vote of the teachers, to another bargaining representative; all in the interest of organizing, recruiting new members and attempting to become the bargaining agent." (Appellees' Brief, pg. 1-2)*

There is no means short of clairvoyance by which the Appellees can know what information will be transmitted by the Appellants. Under Tinker v. DesMoines Independent Community School

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*Additional assertions of the same point are to be found on pgs. 12 and 33 of the Appellees' Brief.

District, 393 U.S. 503, 508 (1969) such speculation about the content of Appellants' future speech, combined with the implicit suggestion that the speech will interfere with discipline in the schools, does not outweigh the Appellants' First Amendment interests. Moreover, even were the Appellants to use school communications media for the purpose of discussing teacher-board relations subjects, or teacher organization matters, the First Amendment does not carve out these topics from the scope of its protection. Thomas v. Collins, 323 U.S. 516, 532 (1945). See too McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).

A more neutral statement of the central issue before the Court is the following:

> Does a board of education's denial to a minority union of teacher mail box, bulletin board, meeting room and dues deduction facilities violate First and Fourteenth Amendment rights of union members and unaffiliated teachers?

The "Majority Rule" Principle of Labor Relations is not Challenged by the Appellants.

Pages 2 through 10 of the Appellees' Brief is a discussion intended to explain the "majority rule" principle of labor relations. Although the Appellants have certain reservations to be discussed below about the interpretation of the authority upon which Appellees rely, Appellants do not disagree with or challenge the majority rule principle. We understand that principle to be as follows: Under the Connecticut Teacher Negotiation Act as under most labor relations statutes, members of the bargaining unit are free to choose among rival organizations which seek to represent them in negotiations with the employer. Once an election has been held, or a successful petition has been filed, and a representative organization has been certified as having obtained majority support, that organization

becomes the exclusive representative of all employees within the unit. The employer has a duty to negotiate with it and with it alone.*

Nothing either explicit or implicit in that principle requires that the speech and association rights of the minority organization be infringed. As we shall demonstrate at Pg. 8 below, the central fallacy in the Appellees' argument is the transition from the majority rule principle to the assertion that the principle requires denial of minority rights.

We turn to an examination of Appellees' gloss upon the majority rule principle. One may question what weight a court considering constitutional issues should accord to either

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* Selection of a teachers' representative organization by petition or election is pursuant to §10-153b(c) and (d) Conn. Gen. Stats.; the winner is the exclusive representative by virtue of sub-section (e); the duty to negotiate arises from §10-153d.

the 1966 Final Report of the New York Governor's Committee on Public Employee Relations, or the 1969 Report on Labor Management Policies of the United States Advisory Commission on Inter-Governmental Relations (Appellees' Brief, pg. 3). The Governor's Committee Report speaks of advantages—to whom and for what purpose are left unsaid-in the elimination of interorganization rivalries. Perhaps so. The Report certainly never addresses the constitutional significance of preferential access.

The United States Advisory Commission Report suggests as one option for a legislature drafting a public employee labor relations statute that management be barred from extending informal recognition to minority organizations; the Appellees do not quote the other option offered in the Report, namely, that public employers may be authorized by statute to extend

informal recognition to the minority organization at their own discretion. Whichever of the two options a legislature might choose would leave unaffected the Appellants' claim of law: the Appellants do not even seek informal recognition by the employer but wish only the right to equal facilities in order to communicate among themselves and with other employees and the right to equal access to dues deduction machinery.

The Appellees seek to show that the Connecticut Teacher Negotiation Act approves the denial of equal communications access to minority organizations except during election times. (Appellees' Brief, pgs. 4-6) Even if the statutes did reflect legislative approval of this denial that would not refute a constitutional argument.

But perhaps the Appellees claim only that this Court should hesitate to issue a declaration

of unconstitutionality which would not merely invalidate contract provisions, but would also imply these statutes are unconstitutional.

The trouble with this claim is that the cited statutes do not require the denial of equal communications facilities; they simply limit the insurance of equality to school systems which have no majority representative, and school systems in which an election campaign is in progress. Thus, these statutes provide guarantees which are narrower than those we claim the constitution requires. The statutes are not unconstitutional in themselves; the only impropriety is in reading them as if they required an inequality which they only fail to prohibit. To the extent that New Haven Federation of Teachers (cited in Appellees' Brief at pg. 6) suggests the statute carries a negative implication and is to be read as restricting

minority organization access rights to the pre-election period alone, that opinion is to be weighed as only a trial court decision in a case where counsel raised no constitutional issues. It was decided two years before Tinker.

The "Majority Rule" Principle Does Not Require that a Minority Organization be Denied Access to Communication Facilities or Dues Deduction Machinery.

The Appellees themselves recognize the Appellants' acceptance of the majority rule principle. (Appellees' Brief, pg. 11) but in the attempt to effect a transition from discussion of the undisputed principle of majority rule to discussion of the central issue in this case they make an important concession:

> [Appellants] challenge a consequence which almost inevitably accompanies the grant of exclusivity: the elected bargaining agent's exclusive right to the use of the employer's premises for the performance of its

> collective bargaining functions, and the denial of such access to defeated rivals....[emphasis added] (Appellees' Brief, pg. 11).

It is significant that the Appellees do not claim that the denial of access to communications facilities inevitably or necessarily accompanies the principle of majority rule. They claim that the two go together "almost inevitably." In other words, by concession, majority rule does not require denial of rights to the minority. Since it is merely "almost inevitable" that there be such a denial the denial is avoidable. This points the way for the Appellants to direct a successful argument: while affirming the authority of the majority rule principle, the Appellants must show how majority rule can co-exist with minority right. This showing has been made in the course of the analysis of the Local 858 decision (Appellants' Brief, pgs. 31-35) and in the discussion at pgs. 44-47 of that Brief.

The Appellees have not Shown that the Principle of Majority Rule, or any Other State Interest, would be Sacrificed by a Grant of the Rights which Appellants Claim.

Pages 16 through 30 of the Appellees' Brief consist largely of the recitation of cases which have already been rebutted at pages 27 through 39 of the Appellants' Brief. The Lullo case (Appellees' Brief, pgs. 21-22) states nothing in conflict with our position here.

The Appellees claim that strict scrutiny is not required in an equal protection analysis here because there is no "fundamental right" to dues deductions, the use of mailboxes, bulletin boards or the like (Appellees' Brief, pg. 23) but their argument consists of nothing more than the bare assertion of that position. They say nothing which in any way diminishes the obvious fact recognized by the Supreme Court in

Healy v. James, 408 U.S. at 181-182 that the media by which speech is communicated bear a First Amendment imprint because denial of access restricts the communication of speech. It follows that such a denial of access impinges upon the fundamental right to disseminate speech, Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974), and such a denial must be subjected to strict scrutiny when the challenge is under the equal protection clause. Indeed, even the Appellees' principal authority, Local 858, although wrong in so many other respects, accepts the applicability of the strict scrutiny test. 314 F.Supp. at 1077.

In Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972) the Supreme Court said:

> There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by

> some groups government may not prohibit others from assembling or speaking on the basis of what they intend to say.

This case serves to meet the Appellees' claim that mail boxes, bulletin boards and similar communications facilities may be made available to the bargaining agent alone. (Appellees' Brief, pg. 23).

This Court has held that a proper place for the communication of ideas "is where the relevant audience may be found." Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir. 1968). The schools are the place where teachers may be found and are a proper place in which to communicate with them.

The Appellees do not respond to the invitation made at page 44 of the Appellants' Brief that they might "focus on the particular provisions in question and show specifically as to

each provision what interests countervail against those of the Appellant .' They quote at length on pages 16 through 19 and recapitulate without comment on page 25 the conclusions of the Court in Local 858 which have been already examined and refuted in the Appellants' Brief at pages 31 through 35.

In attempting to defend the lock-in clauses in the various dues deduction provisions, the Appellees assert that "the teacher electing the dues deduction method of payment receives full benefits of membership immediately but pays on what is essentially an installment plan." (Appellees' Brief, pg. 27) From this it is thought to follow that there is no unfairness in requiring an employee to continue paying for the balance of the year. But there is simply no support for the assertion that "full benefits of membership" afforded in September are

what the employees pay for throughout the year; it seems far more likely that the benefits of Association membership are afforded over the course of the school year as the Association goes about its organizational and representational tasks and that payment by dues deduction is on a pay-as-you-go basis. When a teacher wants to opt out he does not seek a rebate, but merely the cessation of deductions for future services.

The cases cited by Appelless as authority for the propriety of dues lock-in provisions all involved contentions under §302(c)(4) of the Labor Management Relations Act, 29 U.S.C., §186. That statutory provision, applicable to private employers, prevents their entry into collective bargaining agreements which make dues check-offs irrevocable for a period of more than a year. Brooks v. Continental Can Corp., 59

LRRM 2779 (S.D. N.Y. 1965); SeaPak v. Maritime Union, 300 F. Supp. 1197 (D. Ga. 1969) and Operative Potters v. Tell City China Co., 295 F. Supp. 961 (S.D. Ind. 1968). Those cases do not concern themselves with the constitutionality of either the statute or the clauses since of course no constitutional claim will lie against a private employer.* The first cited case

*In their failure to deal with constitutional issues, these cases cited by the Appellees give evidence, if any is needed, of the total emptiness of the Appellees' argument that federal labor legislation has the magical effect of transmuting private action into government action. Surely counsel in one of these cases might have buttressed his argument that Georgia or Indiana statutes forbade the lock-in with the assertion that the Constitution also forbade it. Undoubtedly counsel there made no such claim because they knew there is no respectable argument even to be advanced that SeaPak or the Tell City China Company are governmental agencies. Appellees' argument is dealt with more fully at page below.

explores the legislative history of the NLRA and the last two deal primarily with a question of Federal preemption totally irrelevant to the case at bar.

In sum, the heart of Appellees' Brief (pgs. 16-30) wholly fails to demonstrate that equal access to communications media and dues deduction machinery will impair the ability of the majority organization to perform its function as negotiator, or impose any other cost of sufficient magnitude to outweigh the Appellants' constitutional interests.

The Appellees' Case Authority for the Most Part Arises From the Private Sector, Rests Upon Statutory Authority, and Does Not Bear Upon the Constitutional Claims Advanced Here.

In an attempt to find relevance for several cases involving private employers, the Appellees twice assert that the enactment of a labor relations statute (e.g. the NLRA) is a governmental action which turns the action of private employers under the coverage of the statute into governmental action within the First and Fourteenth Amendments. (Appellees' Brief, pg. 8, 16) No authority is cited for the assertion.

This assertion is demonstrably false:

a) A statute such as the NLRA which establishes the principle of majority rule does not by implication require the denial of communications facilities to the minority. Thus, the NLRA is not itself a governmental action requiring a denial of communications facilities.

b) When a private employer limits the speech activites of its employees, it does so without either a statutory command that it do so or a statutory prohibition upon its doing so. It is

thus acting freely and in a private capacity. Cf. Goldfarb v. Virginia State Bar Association, 421 U.S. 773, 790 (1975). ("Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anti-competitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities....")

An examination of the private sector cases which the Appellees cite in attempted support for their claim of precedent for the denial of

minority right will show that none of the courts even considered the frivolous possibility that the private employer was engaged in state action. Moreover, many of the passages which Appellees quote are taken from factual contexts which are so remote from the case at bar as to render the citations imaginative allegory rather than analagous precedents. ¶ NLRB v. Draper Corp., 145 F.2d 199, 203 (4th Cir. 1944) is quoted by the Appellees on page 12 of their Brief and by their underscoring, Appellees draw attention to the following:

> "just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining...."

We do not question the quoted principle; we do not question its application in Draper

to support an unfair labor practice finding against a minority union which had engaged in a wildcat strike. We do not see how the condemnation of a wildcat strike yields any learning relevant to the question of whether minority unions may be denied access to communication facilities.

Seaboard Terminal Co., 114 NLRB 754 (1955) (Appellees' Brief, pg. 13) involved an unfair labor practice charge against an employer for having allegedly permitted only majority union representatives to have access to the Company's piers during an election campaign. As the trial examiner's intermediate report, approved by the Board, recognized: "It is not urged, either by General Counsel or counsel for the IBL-AFL that the disparity of granting permission alone constituted a violation of the Act or illegal interference with the election. Both the complaint

and the objections cite the activities of union agents on the piers as the real point at issue," 114 NLRB at 758. Thus, this is a private sector case, raising a statutory issue but no constitutional one, in which counsel never urged a point even similar to the one urged here. The citation is weightless.

In the case of Coamo Knitting Mills, Inc., 150 NLRB 579 (1964) (Appellees' Brief, pg. 14n.6) the Board considered a charge of unlawful assistance by the employer to an employee representative organization. The Board's decision states at page 582: "We have held that the use of company time and property does not, per se, establish unlawful support and assistance.... Here, both at the time of the Union's request to address the employees and at the time of the meeting, neither the Employer nor the ILGWU was aware of organizational activity by any other

labor organization. Thus, the request, the Company's approval, and the meeting itself all took place in a one union context." This citation of a one union private sector case is likewise weightless here.

In Hotpoint Co. v. NLRB, 289 F.2d, 683, (Appellees' Brief, pg. 14n.6) the Board dealt with charges of unlawful assistance and employer domination. Here again no rival employee organization was involved.

Armco Steel Corp., 148 NLRB 1179 (1964) (incorrectly cited by the Appellees at pg. 14 n.7) merely contained dicta by the Board as to the statutory propriety of limiting bulletin board access to the majority incumbent union. The practice was not being challenged before the Board. In the order which the Board adopted in the Armco case the employer was ordered to cease and desist from enforcing the contract clause

which prohibited employees from distributing union literature on behalf of a minority union. To whatever extent a holding under the NLRA might be relevant to a decision under the Constitution, the Armco case supports the position of the Appellants rather than that of the Appellees.

The Appellees cite a Federal Personnel Manual Letter (Appellees' Brief, pg. 15 n 9). It may be that some anonymous drafter of regulations, who may or may not have been a lawyer who may or may not have been aware of the constitutional problems he was creating (he wrote in 1966 before Tinker or Healy) thought that it was proper to deny communications access to a minority union. This Court need have no hesitancy about thinking otherwise.

In view of the analysis we have made of the Appellees' claimed precedents, it appears that

the argument ad terrorem made on page 16 need chill no bones. A holding that the Appellants' constitutional claims are valid would invalidate an ill-considered provision in the Federal Personnel Manual; it would not invalidate the Connecticut Teacher Negotiation Act but only require, as a matter of constitutional necessity, equal access to teachers at times and places when the Act does not so require; it would not have any bearing upon the conduct of private employers because, as we have shown, the fact that a private employer is covered by the NLRA does not make the action of that employer into government action.

Conclusion

The Appellees' Brief, even more than the opinion in the Local 858 case, deals with this case as if it presented a problem of labor relations policy. It deals only scantily with the constitutional claims the Appellants have made and does not answer those claims. It is founded upon the mistaken notion that the Appellants' case constitutes an attack upon the principle of majority rule in labor relations.

The invalidation of the clauses under review would not have the effect of substituting the minority organization for the majority as a party to negotiations with the employer. A decision for the Appellants would merely have the effect of drawing the constitutionally required boundary between those powers which the majority must have in order to negotiate and those rights which the minority must be accorded because

of the First and Fourteenth Amendments.

The framers of our Constitution understood the difference between majority rule and the tyranny of the majority; in our schools as in our polity-at-large, it is the Bill of Rights which preserves minority right against majority power. Appellants request reversal of the District Court's decision and entry of Summary Judgment on their claim for declaratory relief adjudging the challenged clauses and policies to be invalid.*

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* In the footnote which concludes their Brief, the Appellees request a remand in the event that the judgment below is reversed. The clean-hands claim which was made below was fully dealt with at pages 5 through 10 of the Plaintiffs' Reply Brief (Doc. 41 reprinted in the Appendix). The stipulation filed below would seem to preclude any need for an evidentiary hearing and permit a final disposition by this Court. (Doc. 36) There is neither factual nor legal support for Appellees' clean-hands defense.

Dated at Hartford, Conn., this 19th day of December, 1975.

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Proof of Service

In accordance with Rule 26(d) Fed. Rules App. Proc., I hereby certify that service of the foregoing brief has been made by this day depositing two copies thereof in the U.S. mail first class postage paid, to each of the following:

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Dated at Hartford, Conn., this 30th day of December, 1975.

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